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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

JOHN S. LOW,
Guardian ad Litem and Next Friend of Annie T. K. Parker, a Minor.

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(19,542.)

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vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

MOTIONS TO DISMISS OR AFFIRM.

And now come defendants in error and move this court to dismiss the writ of error herein, and to confirm the decree entered in the supreme court of the Territory of Hawaii on the 7th day of November, 1904, dismissing plaintiff's petition for writ of prohibition.

Defendants in error base this motion upon the ground that the decree dismissing petition for writ of prohibition was not such a final judgment or decree in a suit in the highest court of the Territory of Hawaii in which a decision in the suit could be had, where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of the statute being repugnant to the

Constitution, treaties, or laws of the United States, in which the decision is in favor of the validity of such statute.

Dated Honolulu, January 31, 1905.

J. S. Low,
Guardian ad Litem and Next Friend
of Annie T. K. Parker.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1904.

ALFRED W. CARTER, *Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,*
vs.
Honorable GEORGE D. GEAR, *Second Judge of the Circuit Court of First Circuit, Territory of Hawaii, at Chambers, and* JOHN S. LOW, *Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.* } No. 442.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

DEFINITIONS.

"Hawaii" means *Kingdom of Hawaii, Republic of Hawaii,* and *Territory of Hawaii,* according to the context.

"Civil laws" means the *laws of the Republic of Hawaii compiled by Sydney M. Ballou.*

"Supreme court" means *supreme court of the Kingdom, Republic, and Territory of Hawaii* according to the context.

"Circuit court" means *circuit court of one of the judicial circuits of Hawaii, as established in 1892 in chapter 57,* being "An act to reorganize the judiciary department." (See section 1135, Civil Laws.) Prior to this act the three judges of the supreme court sat as trial judges at *nisi prius* in the different circuits, and sat *in banco* on matters brought before them on appeal, bills of exception and other writs. (See sections 815 to 846 of the Civil Code of the Hawaiian Islands passed

in the Year of our Lord 1859.) Hence there were practically only two judges of the supreme court to decide causes, as every cause that came before the court *in banco* was from a decision or ruling of one of the three. The act of 1892 changed this, making the supreme court a court of appellate jurisdiction only (see section 1164 of the Civil Laws), and provided for circuit judges.

This will explain many inconsistencies apparent in the Civil Laws, and more especially sections 1497 and 1498, which have been amended by implication.

THE FACTS.

A guardian was first appointed of the estate of Annie T. K. Parker, a minor, referred to in the title hereof, in the circuit court of the first circuit, on the 13th day of October, 1894, by W. A. Whiting, first judge of that court, which guardian afterwards resigned, and on the 25th day of September, A. D. 1899, the above-named petitioner, A. W. Carter, plaintiff in error, was appointed guardian of said minor by W. L. Stanley, second judge of said court, and duly qualified. Special attention is called to this last-mentioned date for the reason that the act to provide a government for the Territory of Hawaii, passed by the Fifty-sixth Congress of the United States of America on the 27th day of April, was approved on the 30th day of April, A. D. 1900, or seven months after the appointment of Carter, which made the estate a pending matter when the organic act was passed. From the time of his appointment up to the 8th day of June, A. D. 1904, when said minor, through J. S. Low, her guardian *ad litem* and next friend, one of the defendants in error, filed the application for his removal, said Carter acted as such guardian, filing accounts regularly in the circuit court of the first circuit.

After many preliminary pleas, including demurrer and motion, upon the case being set for hearing by George D. Gear, second judge of said circuit court, the question of his jurisdiction under the organic act to hear said cause was for the first time raised by motion duly filed by the plaintiff in error; which motion was overruled. The writ of prohibition herein was then sued out of the supreme court, the highest court of the Territory, on the 7th day of September, 1904. Hearing was had thereon, and on the 7th day of November, 1904, the court handed down its decision dismissing the petition. A decree to that effect was signed on the 8th day of November, 1904, from which decree plaintiff in error sued out the writ of error herein.

The attention of the court is called to the fact that, though the petition for the writ of prohibition is based upon several grounds, among which the ground set forth in paragraph seven is that the statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers conflict with article 3, section 1, of the Constitution of the United States, the only question raised on the writ of error is that the statutes of the Territory of Hawaii purporting to confer upon judges of the several circuit courts at chambers jurisdiction to hear and determine an application for the removal of a guardian are inconsistent and in conflict with the organic act—in other words, that no constitutional question is raised in the writ of error. In fact, the first and third specifications of error ought not to be considered at all, for the reason that it is immaterial that the court held that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts at chambers judicial power not incident or ancillary to some cause pending before a court were not in conflict with and in violation of section 81 of the organic act. It is entirely sufficient if the organic act confers such power anywhere within its four corners.

It may also be observed that the second specification of

error is based upon a repeal of the statutes of the Territory of Hawaii, without particular reference to the statutes alleged to be repealed, and to which no specific reference was made in the petition for the writ of prohibition.

The third specification of error is a mere general conclusion as to the correctness of the decision of the supreme court, without pointing out in any manner wherein the court erred. If we are allowed to guess at the meaning of the petitioner, we can impute to him the intention of saying that the organic act repeals by implication all laws of the Territory of Hawaii conferring jurisdiction on judges at chambers in matters of equity and probate. If the court will indulge in this guess, it becomes necessary to understand what is meant by the expressions contained in the statutes conferring jurisdiction in equity and probate, found in the Civil Laws in sections 1145–1148–1497–1498 and 1499.

QUESTIONS OF LAW.

The several questions of law may be presented under two separate heads:

First. DOES A WRIT OF ERROR LIE IN THIS MATTER?

Second. DID THE SUPREME COURT ERR IN DISMISSING THE PETITION OF PLAINTIFF IN ERROR?

Under the first head it is submitted that writ of error does not lie for two reasons:

First Reason: That the decision on the writ of prohibition was not a final decision as contemplated by section 709 of United States Compiled Statutes.

Second Reason: That there is no Federal question involved under said section 709.

Under the first reason the court will observe that the writ of prohibition was to prevent the hearing by Judge Gear of the application to remove the guardian, a matter properly before him in accordance with the laws of the Territory of Hawaii (the organic act excluded), and from a final judgment in which matter an appeal would lie to the supreme court.

"Prohibition cannot be resorted to where there is a plain, speedy and adequate remedy by appeal."

Balentine *v.* Police Court of City and County of San Francisco, 75 Pac. Rep., 336.
In re Gates, 94 N. W. Rep., 292.
People *v.* District Ct. of Second Judicial District, 77 Pac. Rep., 239.
State *ex rel.* Port Orchard, &c., *v.* Supr. Ct. Kitsap County, 71 Pac. Rep., 1100.
State *ex rel.* Stetson, &c., *v.* Supr. Ct. King County, 73 Pac. Rep., 479.
16 Ency. Pl. & Pr., 1118.
2 Spelling Inj. and Ex. Rem., sec. 1729, page 1488.
In re Rice, 155 U. S., 396.
Re Huguley Manfg. Co., 184 U. S., 297.
Decatur *v.* Paulding, 14 Peters, 599–612.
Western *v.* Charleston, 2 Peters, 449.
Knight *v.* Kahnhiser Bros. *et al.*, 44 S. E. Rep., 778.
State *ex rel.* Jaubert Bros. *v.* Leche, 36 So. Rep., 868.

A cogent reason for this rule is that the issuance of the writ of prohibition is not demandable as a matter of right but is of sound judicial discretion.

16 Am. & Eng. Ency. of Law, 1109.

And an order denying the writ is not revisable.

People *v.* Westbrook, 89 N. Y., 152.
People *v.* McCue, 76 N. Y. Sup., 485.
State *ex rel.* Pulliam *v.* Fort, 81 S. W. Rep., 476.
People *v.* Dist. Ct. of Second Judicial District, 77 Pac. Rep., 239.

Section 709, U. S. Compiled Statutes, requires that there shall be a final judgment. There has been no final judgment in the matter of the application for the removal of A. W. Carter.

"The writ of error at common law is applicable only where the judgment to which it is sued out has the character of finality. All the books show that final judgment must be first rendered before the cause can be carried into a superior tribunal by writ of error."

"When the highest court of a State upon the first appeal decides a Federal question against the appellant and remands the case to an inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he cannot have that judgment reviewed by the supreme court by writ of error, without first appealing from it to the highest court of the State, or at least where such is the practice, presenting a petition to that court for leave to appeal."

Fisher *v.* Perkins, 122 U. S., 522.

Great Western Tel. Co. *v.* Burnham, 162 U. S., 339.

For the foregoing citations see 4 Federal Statutes Annotated, 469, in which it is also said:

"A proceeding for a writ of prohibition to restrain a municipal corporation from carrying an ordinance into effect is a suit within the meaning of this section."

Western *v.* Charlston, 2 Peters, 449.

This last case is incorrectly relied upon by plaintiff in error to sustain his contention that a decision on a writ of prohibition is a final decision. While the decision literally so holds, it will be observed that the writ of prohibition was not to restrain a suit pending before the court, and in that respect the decision was final. While the decision has been very severely criticised, and it may be doubted if it will be considered good law at this time, it does not apply to this case.

See also 7 Ency. Pl. and Pr., 832-'3-842.

"A certiorari may remove the record in any stage of the proceedings at the discretion of the court. Error is of right and lies only after final judgment."

Drowne *v.* Stevinson, 2 Mass., 441.
4 Ency. Pl. and Pr., 1.
7 Ency. Pl. and Pr., 820

It cannot be contended that the decree dismissing the petition for a writ of prohibition is a final decree. If it were final, as many writs of prohibition could be obtained as there could be Federal questions raised. Writs of prohibition could be sued out in all stages of the case. If a writ of error should lie from the denial of a writ of prohibition, the trial of the case on its merits could be deferred until a decision should be rendered on each writ in this court. If this court should sustain the decision of the territorial supreme court dismissing the writ, the case would be sent back to the circuit court for further proceedings. A new writ of prohibition could then be applied for on some other question, and the same process gone through with as on the first. It is therefore easily seen that not only could a trial be delayed indefinitely, but the expenses of litigation could be made so burdensome that only the rich man would in every case prevail.

See Chesapeake & Ohio Railway Co. *v.* E. A. White, adm'r, 111 U. S., 134.

Under the second reason the validity of a State statute must be drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision must be in favor of the validity of such statute.

Here again it will be observed that there are two prerequisites to permit this writ of error:

First. That the validity of a statute of the Territory of Hawaii must be drawn in question.

4 Fed. Stat. An., 470.

Second. The decision must be in favor of the validity of such statute.

4 Fed. Stat. An., 470.

First Prerequisite: While section 709 of the United States Compiled Statutes applies to State courts, section 86 of the organic act provides that "the laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

It is difficult to see how it can be contended that any decision of the territorial supreme court has been rendered in this matter affecting the validity or invalidity of any statute of the Territory of Hawaii. The most that can be said is that all laws of the Territory of Hawaii with reference to the jurisdiction of circuit judges at chambers were repealed—not directly, but by implication—by the organic act. In other words, it says the organic act is valid.

By section 6 of the organic act it is provided "that the laws of Hawaii not inconsistent with the Constitution or laws of the United States, or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of the Territory of Hawaii or the Congress of the United States."

The statute referred to in section 709, United States Compiled Laws, is a statute, it is submitted, passed subsequent to some act of Congress, and not one that existed prior to some act of Congress with which that act was in conflict. In the latter case the act of Congress would be in conflict with a prior State statute. There could be no question as to the validity of the State statute. It would be purely a question of construction as to whether or not the State statute had been repealed, and would have to be construed the same as any other question of construction.

"A decision of the State court resting upon the construction and not the validity of a statute of the State, does not present a Federal question."

4 Fed. Stat. An., 473, and cases cited.

If a mere question of the construction of the organic act could be brought to this Supreme Court, a Federal question could be raised in nearly every case arising in the territorial courts.

Section 6, continuing the laws of the Territory of Hawaii in force, is equivalent to making those laws a part of the organic act. It is well settled that prohibition cannot issue from the United States Supreme Court where there is no appellate power given by law or any special authority to issue the writ.

Ex parte Gordon, 66 U. S., 503.

16 Ency. Pl. & Pr., 1101, note 1, and 1102.

Second Prerequisite: A decision of the territorial supreme court in this matter is not in favor of the validity of the State statute. It says in effect that the organic act provides a court for the hearing of the application for the removal of the guardian. It does not attempt to say that the territorial statute as such is valid or invalid. The question of the validity of the territorial statute is not raised.

Under the second head, did the supreme court of the Territory of Hawaii err in dismissing the petition of plaintiff in error, the discussion takes a double aspect:

First. A CONSIDERATION OF THE LAWS OF THE TERRITORY OF HAWAII, and

Second. A CONSIDERATION OF THE ORGANIC ACT.

CONSIDERATION OF THE LAWS OF THE TERRITORY OF HAWAII.

The sections of the civil laws heretofore referred to provide:

Section 1145 as amended by Laws of 1903:

"The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts according to law as follows:

"*First.* To hear and determine all matters in equity.

"*Second.* To hear and determine all matters of divorce, separation and annulment of marriage.

"*Third.* To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts, and to account in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs-at-law of deceased persons and to decree the distribution of intestate estates."

In other subsections additional powers are given which it is unnecessary to refer to.

"SEC. 1148. Matters in the jurisdiction of judges of the circuit courts in chambers, as set forth in section 1145, shall be determined by the judge having jurisdiction thereof, without the intervention of a jury, except as provided in the seventh division of said section 1145."

"SEC. 1497. In addition to the jurisdiction in equity otherwise conferred, the supreme court and the several justices thereof and also the several circuit courts shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made, and may issue all general and special writs and processes, required in proceedings in equity to courts of inferior jurisdiction, corporations and individuals when necessary to secure justice and equity."

"SEC. 1498. The supreme court and the several justices thereof, and also the several circuit courts, may hear and de-

termine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law, that is to say: * * *"

"SEC. 1499. Cases in equity may be commenced by bill or petition with a writ of subpœna according to the usual course of proceedings in equity, or inserted in an original writ of summons, or of summons and attachment, or by declaration in an action of contract, or tort, as the case may be, with or without an order for the attachment of the property or arrest of the defendant, and shall be returnable at the terms of the court or on the rule days established by the court.

"The material facts and circumstances relied on shall be stated with brevity, omitting immaterial and irrelevant matters."

"SEC. 1515. Matters of probate and of administration shall be heard and determined by the judge or court having jurisdiction thereof, without the intervention of a jury."

What the court must determine is whether or not Judge Gear, sitting at chambers, was holding court regularly, and under the statute of the Territory of Hawaii in the matter of the application to remove Alfred W. Carter, guardian of Annie T. K. Parker.

Opposing counsel attempt to make a point out of the amendments contained in Session Laws of the Republic of Hawaii of 1898, act 56, page 107, and of the Session Laws of the Territory of Hawaii of 1903, act 16, page 17, and act 32, page 198. The answer, however, is, in the first place, that these amendments are entirely consistent with the organic act, and in the next place, if they are not, they do not affect these proceedings in any way, for the application for the removal of Carter is equally consistent with the statutes and with the amendments, but if the amendments should be held to be invalid it would not in any way affect the application for removal. They also try to make capital out of the endorsement on the back of the covers of the pleadings and papers filed in the removal proceedings. It is submitted that it is beneath the dignity of the court to listen to legal quibbles.

The language used is perfectly plain. The court will not concern itself about the form of entitling any pleading in the matter of the removal of Carter or the clerk's filing certificate thereon so long as it can be gathered from the pleading itself in which court and in which cause it was intended to be filed. It will not permit a person to suffer because a clerk not knowing his duties files a document with an incomplete filing certificate. All the pleadings filed in the removal matter show without any shadow of a doubt that they were entitled and filed in the court of the first judicial circuit, having jurisdiction under the statute to hear and determine matters of probate, and were duly considered by Judge Gear. To say that the endorsement or filing mark on a paper would affect the contents would be as trivial as to say that the color of paint on an ocean steamer could affect in any way its tonnage or strength.

In the constitution granted by His Majesty Kamehameha III, King of the Hawaiian Islands, June 14, 1852, found in the Session Laws of 1860, article 84 reads:

"The judicial power shall extend to all cases, in law and equity, arising under the constitution, any law of this kingdom, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction."

Article 85 reads:

"The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may from time to time indicate."

In the constitution granted by His Majesty Kamehameha V on the 20th day of August, 1864, found in the Session Laws of 1864–'5, are the following articles:

"Article 64. The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may, from time to time, establish."

'Article 66. The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may, from time to time, prescribe, and the tenure of office in the inferior courts of the kingdom shall be such as may be defined by the law creating them.

"Article 67. The judicial power shall extend to all cases in law and equity arising under the constitution and laws of this kingdom, and treaties made, or which shall be made under their authority, to all cases affecting public ministers and consuls, and to all cases of admiralty and maritime jurisdiction."

In the constitution granted by His Majesty Kalakaua on July 6 and promulgated July 7, 1887, and found in the Session Laws of 1886, are the following articles:

"Article 64. The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may, from time to time, establish."

"Article 66. The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may, from time to time, prescribe, and the tenure of office in the inferior courts of the kingdom shall be such as may be defined by the law creating them."

Under article two of the constitution of the Republic of Hawaii, promulgated on the 3d day of July, 1894, it is provided that "the judicial power of the Republic shall be vested in one supreme court and in such inferior courts as the legislature may, from time to time, establish."

The act to reorganize the judiciary was passed in 1892, and if we read the act literally the only court that ever existed in the Republic of Hawaii after the promulgation of the constitution was the supreme court, for no inferior court was thereafter ever created by the legislature. In fact, no court in equity or probate ever existed if the contention of opposing counsel is correct, for from the very earliest times

the laws conferred such jurisdiction upon "judges at chambers," and not upon "courts."

In section 1136 of the Civil Laws it is provided that "there "shall be established in each of the judicial circuits in the "Hawaiian islands a court, with the powers and under the "conditions hereinafter set forth, which shall be styled the "circuit court of such circuit, as, for instance, the circuit "court of the third circuit." Attention is called to the fact that there are no courts of the circuit judges at chambers, but that whatever proceedings come before a judge at chambers are in the circuit court.

Section 1138 provides for the terms of the circuit courts of the respective circuits.

Section 1146 reads:

"Provided, however, that the powers and jurisdiction of circuit courts and of circuit judges in chambers relating to causes of a civil nature as hereinbefore defined, shall be limited as follows."

(Here follow the provisions with reference to the circuit in which the several matters specified shall be tried.)

Section 1151 reads:

"The several circuit judges shall have power to administer oaths and to compel the attendance of parties and witnesses from any part of the Republic, and the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice in matters pending before them in chambers, and to take all other steps necessary to carry into full effect all the powers which are or may be given them by laws of the Republic, in like manner as the circuit court may do in term time."

Section 1181 reads:

"The clerk shall have charge of the records and business in the Honolulu office, one deputy clerk shall be assigned to each circuit judge of the first circuit, and there shall be

one or more deputy clerks assigned to each of the other circuit courts."

Section 1182 reads:

"The clerks of the courts of record of the Republic shall have power to issue process, administer oaths, take depositions, tax costs and perform all other duties appertaining to their office. They shall also be *ex officio* masters in chancery. A clerk shall attend and record the proceedings at all sittings of courts of record, and in proceedings before a circuit judge in chambers shall, if there is no official reporter in attendance, record the oral evidence adduced when so required by the judge."

Section 1183 reads:

"The several clerks of the judiciary department shall have the custody of all records, books, papers, money and other things pertaining to the courts where they are assigned for duty."

Section 1184 provides that there shall be kept in Honolulu proper registers and indexes of the business of all the courts of record of this Republic.

Section 1185 provides that each court of record shall have a seal, which shall be in the custody of the clerk of such court, and shall be impressed upon all processes and official certificates, accompanied by the clerk's official attestation.

Section 1518 provides that "on all appeals from a decision of a probate judge at chambers, whether the same be tried before the jury or before the court without the intervention of a jury, the record of the court below may be read as testimony," &c.

Section 1519 reads:

"In all cases in which any person, whether a citizen of this Republic or otherwise, shall decease in any part of this Republic, leaving a will * * * it shall be incumbent upon the person named as executor of such will * * *

to apply to some judge of a court of record at chambers for probate of such will," &c.

Section 1520 reads:

"It shall in like manner be incumbent upon the person entitled and desirous to administer upon the estate of any person dying intestate in this Republic, to apply by petition to some judge of a court of record at chambers, for power to administer thereon."

Section 1502 provides that all applications for the foreclosure of mortgage, for partition and division of real property, shall be by sworn petition addressed to some court, or justice having jurisdiction thereof.

Section 1503 provides that in all cases not demanding secrecy or occasioning doubt the court or judge may, &c.

Section 1504 provides that process shall be served in such manner as the court or judge may direct, and the court or judge may direct publication of summons.

Section 1505 provides that the judge or court may assess the amount due upon mortgages.

Section 1512 provides that the justice may hear the controversy without the intervention of a jury, or he may cause the jury to be impaneled.

Section 1515 provides that matters of probate and of administration shall be heard and determined by the judge or court having jurisdiction thereof, without the intervention of a jury.

Section 1516 provides that any person claiming before any judge, sitting as a court of probate, any interest in the estate of a deceased person who may deem himself aggrieved by the decision of such probate judge at chambers may appeal.

Section 1517 provides that the appellee may likewise move the court that any issue of fact may be tried by the jury.

Section 1518 provides that on all appeals from a decision

of a probate judge at chambers the record of the court below may be read as testimony.

Section 1519 provides that in case of death it shall be incumbent on the person named as executor in the will to apply to some judge of a court of record at chambers for probate.

Section 1520 provides that any person desiring to administer on an intestate estate shall apply by petition to some judge of a court of record at chambers.

Section 1525 provides that an executor or administrator shall advertise for as long a time as the court shall direct.

Section 1528 provides that the court or judge shall have power to issue letters rogatory.

The preamble to section 1529 speaks of the probate courts of this Republic, and is referred to in the same manner in section 1529.

Section 1493, page 576, Civil Laws, speaks of copies and exemplifications of the probate of a will had before a judge or court having probate powers. The supreme court has repeatedly held that a judge sitting at chambers in probate is a court of record.

See—

In re Estate Wm. Brash, 15 Hawn., 372, p. 376.
Hoare *v.* Allen, 13 Hawn., 257, p. 262.
Aldrich *v.* First Judge, 9 Hawn., 470.

It is plain from the foregoing references to our statutes and constitution that the narrow meaning sometimes given to the word "chambers" does not prevail in the Territory of Hawaii. Here the circuit judges in the trial of matters of probate and equity at what is known as "at chambers" act as a court. They decide upon the merits of the case and do not merely act upon matters collateral to the main issue.

The words "circuit judges in chambers" and the word "court" are used as convertible terms. To hold to the contrary would not only violate common sense but also the

uniform practice of the courts of this Territory from the very organization of the government of these islands. The absurdity of such a contention is apparent when we come to consider the effect that would follow such a construction. The result would be that there has never been a legal tribunal in this country with power to try equity and other matters determinable by a judge of the circuit court, other than law matters in term time. To even suggest such a proposition is so monstrous that it ought not to receive patient consideration by the court. From the language of the supreme court in its decision in this matter, page 251, Advanced Sheets Haw. Rep., volume 16, "it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under our Hawaiian constitutions, or immediately prior to the enactment of the organic act."

Defendants in error pay little regard to the names that are given things. It is immaterial to them whether the court in which the petition for removal is pending is styled the circuit court, before a circuit judge at chambers, or probate court or judge. If the matter is properly pending in the tribunal that has jurisdiction, the name that is given this tribunal is entirely immaterial. It may be admitted for sake of argument that it has been the general custom, when we speak of the circuit court, to mean the circuit court sitting in term time, but this does not preclude the broader meaning which has been provided for by the statutes already referred to—that is, the circuit court as it exists in all its branches, including term, equity, and probate.

ORGANIC ACT.

In considering this branch of the subject it must be constantly kept in mind that the constitutional and statutory enactments hereinbefore referred to were in existence long prior to the organic act. It is not the case of the enactment

of a statute subsequent to the organic act, which could not have been specifically within the intention of the framers of that act. With this proposition clearly in mind we turn to the organic act for the purpose of ascertaining the intention of Congress with reference to the judiciary system of Hawaii. Did Congress intend to wipe out by far the greater part in importance of the laws of Hawaii, and deprive every citizen of his constitutional right of due "process of law" in all the cases in equity and probate which vastly exceed in their pecuniary character all other cases together coming within the jurisdiction of the courts. If Congress had any such diabolical intention it is quite apparent that such a law would be in violation of the Constitution of the United States, and therefore inoperative. It is insulting to Congress to impute to it any such intention.

Plaintiff in error has confined himself to an attack upon section 81 of the organic act. This is entirely misleading and unwarranted by authority, for in arriving at the intention the entire act must be considered.

Attention has already been called to the fact that the matter of the estate of Annie T. K. Parker was pending in the courts long prior to the organic act, and thus was a continuing matter (see Guardianship of Long Minors, 7 Haw., 368, on page 373), and therefore this writ of error must be dismissed for the reason that special provision is made in section 10 of the organic act for matters then pending in the courts as follows: "All such proceedings, all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." We might stop at this point with perfect confidence; but inasmuch as the question is of great importance to the entire Territory, it is very desirable that this Supreme Court shall give a decision on the merits and put the question at rest forever.

Section 6 of the organic act provides that all laws of

Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of the Territory of Hawaii.

Section 7 of the organic act provides that the constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the Civil Laws, Penal Laws, and Session Laws, and relating to the following subjects, are hereby repealed; then follows a lengthy enumeration of the laws repealed, which in no way affect the provisions of the statute giving probate and equity jurisdiction to the circuit courts.

Section 10 of the organic act provides, as hereinbefore stated, that all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii. We have in this section an express recognition of the existence of courts of equity in the Territory of Hawaii, and a recognition by implication of the existence of courts of probate in the Territory of Hawaii in the words "and other proceedings." Is anything plainer needed than the express words of this statute to show that the courts, equity and probate, as well as other courts, should exist after the organic act in the same manner as they existed prior to the organic act?

Section 81 of the organic act provides "that the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish, and until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure, shall continue in force except as herein otherwise provided." Opposing counsel contend that the circuit courts referred to here are the circuit courts in term, which have cognizance of law matters only; that the ex-

ception "except as herein otherwise provided" is limited to section 81, and from these propositions their extraordinary construction is arrived at. Our contention is that the phrase "circuit courts" is used in the same sense as in the statutes, including the powers of the circuit judges in equity as well as in probate, which powers are conferred by the use of the word "chambers," and that the provision "until the legislature shall otherwise provide" means just exactly what it says, and that all the laws remain in force, and not a part of them; that the phrase "except as herein otherwise provided" refers to the organic act. As there is no exception contained in paragraph 81, to say that the phrase "except as herein otherwise provided" refers only to section 81 is absurd and meaningless. If the phrase "except as herein otherwise provided" refers to the entire organic act, it refers to the repeal of laws under section 7 and to sections 83 and 84. It might have been just as well to have used the same expression found in section 6, "the provisions of this act," but it is submitted the meaning would not have been made clearer. Even if the narrow meaning of confining the words "except as herein otherwise provided" to section 81 should be adopted, it is still equally clear that the expression "circuit courts" refers to the courts as they existed prior to the organic act; that the words "in chambers" should have the same meaning as given to them in Hawaii prior to the organic act in designating courts exercising equity and probate powers.

Section 83 provides that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature. To have suited opposing counsel, this section should read that "the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, and also except laws regulating the

procedure in equity and probate, all provisions referring to the same being hereby repealed, are continued in force."

Independently of the construction which has been placed upon the words "in chambers" in Hawaii, it is submitted that the words "circuit courts" mean the courts referred to in the expression "in chambers." In Wilcox *v.* Wilcox, 14 N. Y., 577, the court held that a subsequent act establishing special terms did not prevent the former practice of the courts in equity cases hearing and deciding matters in chambers.

See also—

Presley *v.* Lamb, 105 Ind.
Granite Mining Co. *v.* Weinstren, 7 Mont., 349; 17 Pac., 108.
O'Bear *v.* Littler, 59 Ga., 584; 4 S. E., 914.
Pease *v.* Waggoner, 20 S. E., 637.
Stuart *v.* Daggey, 13 Neb., 290; 13 N. W., 309.

After all, as a Massachusetts court has said, chambers is only a place where the court sits without a jury.

Commonwealth *v.* McLaughlin, 122 Mass., 449.

The cases cited by opposing counsel in opposition to this last proposition are:

Spencer Creek Water Co. *v.* Vallejo, 48 Cal., 70.
Risser *v.* Hoyt, 53 Mich., 185.
Toledo Railway Co. *v.* Dunlap, 47 Mich., 456.
Rowe *v.* Rowe, 28 Mich., 353.
Pittsburg, &c., Ry. Co. *v.* Hurd, 17 Ohio State.
State *v.* Woodson, 161 Mo., 444.

It will be seen that all these cases are controlled by their own peculiar circumstances and do not apply.

Nothing could be more significant in considering the question as to whether or not the laws conferring jurisdiction in equity and probate upon circuit judges were repealed than the provisions of section 7 of the organic act, which specifically repeals all the laws that are intended to be repealed, leaving unrepealed all laws under which circuit judges of chambers assume jurisdiction of equity and probate matters. It could not have been the intention of Congress to deprive us of a chambers jurisdiction, as provided in our civil laws. Such an intention would be violative of our constitutional guaranty of due process of law.

The fact that all the objectionable statutes were specifically repealed makes it conclusive that no such intention existed.

There would be anarchy in case the courts of equity and probate were divested of their power.

That such an intention would violate the constitution, see—

Brannon, 14th Amendment, pp. 1-64-'5-97-147-285.

"A proceeding in equity is due process of law."

McLane *v.* Leicht, 69 Iowa, 401; 29 N. W., 327.

"The bills of rights in the American constitutions have not been drafted to secure old principles against abrogation or violation. They are conservatory rather than reformatory instruments."

Weimer *v.* Bunbury, 30 Mich., 201.

The organic act must be considered in the same light as a State constitution.

"In seeking to interpret the meaning of a constitutional provision, the intent of the framers of the instrument should, if possible, be ascertained and carried out."

Bourland *v.* Hildrith, 26 Cal., 161.

People *v.* Leonard, 73 do., 230.

Hills *v.* City of Chicago, 60 Ill., 86.

"Constitutions must be construed if possible so as to give force and effect to each provision."

Cohen *v.* Wright, 22 Cal., 293.
French *v.* Teschemaker, 24 do., 518.
Marye *v.* Hart, 76 do., 291.
Livesay *v.* Wright, 6 Colo., 92.
People *v.* Garner, 47 Ill., 246.
Dyer *v.* Bayne, 54 Md., 87.
State *v.* McCornwell, 8 Neb., 28.
Norton *v.* Bradham, 21 S. C., 375.
Lastro *v.* State, 3 Tex. App., 363.
Cordova *v.* Same, 6 do., 207.

"The remark of Lord Bacon that 'as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated' expresses a principle of the common law, applicable to the constitution, which is always to be understood in its plain, untechnical sense."

Page *v.* Allen, 58 Pa. St., 338.
S. C., 98 Am. Dec., 272.

"Courts scrupulously regard the substance of an act in passing on its constitutionality, and give only a secondary consideration to the form in which it is expressed."

Rutgers *v.* City of New Brunswick, 42 N. J. L., 51.

"The constitution should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, *and the Government left* in the full and free exercise and enjoyment of all its rights, privileges and immunities."

State *v.* Ashley, 1 Ark., 513.

"On constitutional questions where the human reason may pause and the judgment be suspended on account of the uncertainty in the language employed, broad considerations of expediency are not to be overlooked."

City of Baltimore *v.* State, 15 Md., 376.

"A construction of a constitutional amendment, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms absolutely require such preference."

In re Greffin, Fed. Cas. No. 5815.

"A word having a meaning established by judicial construction when used in a new State constitution must be taken to be used in that established sense."

Jenkins *v.* Ewin, 55 Tenn., 456.

"In construing the constitution the court must take into consideration the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it, keeping always in view the proper office of the constitution, which is to declare general rules and principles, and to leave to the legislature the duty of preserving or enforcing them by appropriate regulations."

Bandel *v.* Isaac, 13 Md., 202.

"The constitution is to be interpreted with reference to the previous legislation of the State, and powers always previously exercised by the legislature remain to them, unless expressly or impliedly prohibited to them."

City of Baltimore *v.* State, 15 Md., 376.

"Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction."

People *v.* State Treasurer, 23 Mich., 499.

"Contemporaneous legislative construction will be considered in determining the constitutionality of legislative enactments."

Burgoyne *v.* Board of Sup'rs of San Francisco County, 5 Cal., 23.
Livesay *v.* Wright, 6 Colo., 92.
Bunn *v.* People, 45 Ill., 398.
Collins *v.* Henderson, 74 Ky. (11 Bush), 74.
State *v.* Parkinson, 5 Nev., 17.
Cordova *v.* State, 6 Tex. App., 207.

"Where questions of constitutional construction are doubtful, courts will defer to the construction made by the legislature."

Kendall *v.* Kingston, 5 Mass., 534.
Jackson *v.* Board of Supervisors, 34 Neb., 680; 52 N. W., 169.
Hedgcock *v.* Davis, 64 N. C., 650.

"Contemporaneous construction of a constitutional provision as evidenced by the popular understanding of its meaning at the time is of little force, but the practical applications of its provisions at the time of their adoption furnish strong presumption that such construction rightly interprets the intention."

McPherson *v.* Secretary of State, 92 Mich., 377; 52 N. W., 469; 31 Am. St. Rep., 587; 16 L. R. A., 475.

"A word having a meaning established by judicial construction, when used in a new State constitution, must be taken to be used in that established sense."

Jenkins *v.* Ewin, 55 Tenn. (8 Heisk.), 456.

"Where the words employed in a constitution, when taken in their ordinary signification, embody a definite meaning, which involves no conflict with other parts of the same instrument, the court has no authority to refer to extrinsic matters tending to show that a different meaning was intended."

Hills *v.* City of Chicago, 60 Ill., 90.

"The fact that const., art. 12, par. 15, has its place under an article headed 'Education,' is of no significance as to the meaning and intent of that part relating to county officers generally, as is shown by the proceedings of the constitutional convention."

State *v.* Barnes, 24 Fla., 29; 3 South., 433.

"The construction of the constitution adopted and acted on by the legislature, and acquiesced in by the people for many years, is entitled to great weight with the courts."

State *v.* Gerhardt, 145 Ind., 439; 44 N. E., 469.

City of Faribault *v.* Misener, 20 Minn., 396 (Gil., 347).

Moers *v.* City of Reading, 21 Pa. St. (9 Harris), 188.

"Where a statute has been long acquiesced in, and acted upon without question, and great interests are involved under it, the court will hesitate long before disturbing it,

and will not then do so unless fully convinced that it is in violation of the fundamental law of the State."

Carson *v.* Smith, 5 Minn., 78 (Gil., 58); 77 Am. Dec., 539.

"After the organization of a county and its general recognition throughout the government of the State, and after it has been represented in several sessions of the legislature, it is contrary to public policy to hold such organization void on account of the want of power to erect such a county."

Rumsey *v.* People, 19 N. Y., 41.

"While the fact that enactments have been sanctioned by long continued and unquestioned exercise of the power conferred thereby is not conclusive on the question of their constitutionality, yet it will have much weight with the court in determining such question."

Wallack *v.* City of New York, 3 Hun., 84.

"The fact that the act providing that certain offenses may, at the election of the defendant, be tried by a justice of the peace and six jurors has been in operation in at least two counties for over twenty-one years, and in many counties for about ten years, and has never been called in question, is persuasive evidence that the act is not in conflict with the constitution."

Lavery *v.* Commonwealth, 101 Pa. St., 560.

"A constitution must be interpreted rather with reference to its special and general intent, and the ordinary and usual course of the phraseology than to the literal and technical meaning of the words used."

People *v.* Faucher, 50 N. Y., 288.

Respectfully submitted,

J. S. Low,
Guardian ad Litem and Next Friend of
Annie T. K. Parker.

Dated Honolulu, *January* 31, 1905.